



Registrar

National Electric Power Regulatory Authority

Islamic Republic of Pakistan

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No. NEPRA/TRF-71/NPL-2007/1727-1729
May 17, 2013

Subject: **Decision of the Authority in the matter of Motion for Leave for Review filed by Nishat Power Ltd. Pursuant to Rule 16(6) of NEPRA (Tariff Standards and Procedure) Rules, 1998 against the Decision of the Authority regarding Adjustment of Calorific Value (CV)**

Dear Sir,

Please find enclosed herewith the subject Decision of the Authority (06 pages) in the matter of Motion for Leave for Review filed by Nishat Power Ltd. against Authority's Tariff Decision dated 08.02.2013 in Case No. NEPRA/TRF-71/NPL-2007, for information.

Enclosure: As above

(Syed Safeer Hussain)

Secretary
Ministry of Water & Power
'A' Block, Pak Secretariat
Islamabad

CC:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.



DECISION OF THE AUTHORITY IN THE MATTER OF MOTION FOR LEAVE FOR REVIEW FILED BY NISHAT POWER LIMITED PURSUANT TO RULE 16(6) OF NEPRA TARIFF (STANDARDS & PROCEDURE) RULES 1998 AGAINST THE DECISION OF THE AUTHORITY REGARDING ADJUSTMENT OF CALORIFIC VALUE (CV)

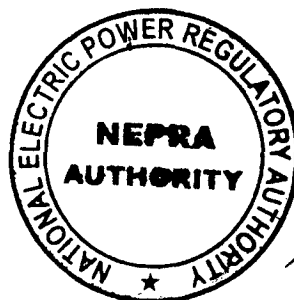
1. Nishat Power Limited (hereinafter referred as "Petitioner") is a generation licensee of National Electric Power Regulatory Authority, (hereinafter referred as the "Authority"). The Authority vide its decision dated 8th February 2013 determined an amount of Rs. 290.423 million payable by the Petitioner to the power purchaser on account of adjustment of calorific value of furnace oil. Being aggrieved with the said decision, the Petitioner filed a motion for leave for review on 21st February 2013 under Rule 16(6) of NEPRA Tariff (Standards and Procedure) Rules, 1998 (hereinafter referred to as, "Tariff Rules") stating, *inter alia* that the Authority's decision imposes on NPL, the liability of Calorific Value (hereinafter referred as "CV") refund to the Power Purchaser (CV) in the sum of Rs. 290,423,461 against NPL's acknowledgement of CV refund liability in the sum of Rs. 20,331,662 vide NPL's letter dated 6th August 2012.
2. As per Rule 16(6) of the Tariff Rules read with regulation 3(2) of the NEPRA (Review Procedure) Regulations 2009, a motion for leave for review is competent only upon discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record. Thus in order to examine the maintainability or otherwise of the motion for leave for review, the Authority considered it just and appropriate to provide an opportunity of hearing to the parties in terms of Regulation 3(6) of the National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009. The hearing into the matter was conducted on March 26, 2013 at NEPRA main office and the same was attended by the representatives of the Petitioner.
3. Having heard the contentions raised during the course of hearing and after going through the relevant record, the findings of the Authority on respective points agitated by the Petitioner are as under:-
4. The Petitioner while filing the motion for leave for review did not raise any legal objection regarding competency of the Authority to hear and decide the instant review petition. However during the hearing, the learned counsel for Petitioner raised the objection that the subject motion for leave for review cannot be competently heard by the existing members of the Authority keeping in view the provisions of Rule 16(6) of the Tariff Rules which provides that within 10 days of service of a final order, determination or decision of the Authority, a party may file a motion for leave for review by the full strength of the Authority of such final order, determination or decision as the case may be. The learned counsel for Petitioner further stated that in terms of section 3(1) of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (hereinafter referred to as, "NEPRA Act"), the Authority means a chairman to be appointed by Federal Government and four members, one from each province, to be appointed by the Federal Government after considering the recommendations of the respective Provincial Governments. Accordingly, existing members of the Authority are not





competent to hear or decide such motion for leave for review and such proceedings are coram non judice.

5. The Authority has carefully gone through the preliminary objection of the learned counsel for the Petitioner in the light of the provisions of NEPRA Act, Tariff Rules and NEPRA (Review Procedure) Regulations, 2009 (hereinafter referred to as, "Review Regulations") and is of view that the provisions of Tariff Rules cannot be read in isolation and standalone basis and are to be read with the relevant provisions of the NEPRA Act for clarity and proper understanding. Undoubtedly, as stated by the learned counsel by the Petitioner, section 3(1) of NEPRA Act provides that Federal Government shall, by notification in the official Gazette, establish a National Electric Power Regulatory Authority consisting of a Chairman to be appointed by the Federal Government and four members, one from each province, to be appointed by the Federal Government after considering the recommendations of the respective Provincial Governments. Moreover, to ensure continuity and smooth functioning of the Authority in case of vacancy or defect in the constitution of the Authority, section 3 (6) of NEPRA Act provides that no act or proceeding of the Authority shall be invalid by reason only of the existence of vacancy in, or defect in, the constitution of the Authority. Furthermore, section 5 (2) NEPRA Act provides for the quorum of the Authority for the purpose of taking any decision whereby three members shall constitute a quorum for meetings of the Authority requiring a decision by the Authority. A simple and collective reading of the referred provisions of the NEPRA Act clarifies that though four members and one chairman constitute the Authority however if at any time, the post of any member or chairman is vacant or there is any other defect in the constitution of the Authority, the acts or proceedings of the Authority shall not be invalid and it cannot be declared as coram non judice. Most importantly, there is a specific provision of quorum in NEPRA Act and three members constitute a quorum and any decision taken by the three members of the Authority shall be valid and cannot be questioned on the ground as contended by the learned counsel for the Petitioner that since no chairman has been appointed therefore no decision can be taken by the Authority.
6. The learned counsel for the Petitioner has also relied on the judgment of Honorable Supreme Court of Pakistan titled M/s Waheed Sons, Lahore and Others vs. National Tariff Commission, Islamabad & other and has stated that in the light of the judgment of the Honorable Supreme Court of Pakistan, the Authority is not properly constituted and is therefore coram non judice. The Authority has gone through the judgment of Honorable Supreme Court of Pakistan ("Judgment") and is of view that the Judgment was specifically based upon the provisions of National Tariff Commission Act, 1990 ("Act") and is distinguishable from the legal provisions and scheme of NEPRA Act.
7. In the referred case (paragraph 10 of the Judgment), the initiation of the investigation, determination of preliminary and final imposition of the duty was challenged on the ground that these decisions could have been made competently by a Commission duly constituted in accordance with the mandate of the section 5 of the Act whereas in the instant case, all these decisions were made by the Chairman and a Single Member of the Commission, in the absence of third member, as such, decisions so made could not be treated as decisions of the





Commission; particularly, when there is no provision of quorum available enabling them to act as a Commission. The very basis of challenging the decision of the Commission was that there was no provision of quorum available in the Act however as stated in preceding paragraphs, there is a clear provision of the quorum in NEPRA Act and as per the provision, three members constitute a quorum for the purpose of taking any decision. Another important distinguishing point is that there is a clear provision in the form of section 3 (6) of NEPRA Act which safeguards and protects the actions of the Authority from becoming invalid merely on ground of any vacancy or defect in the constitution of the Authority however no such provision exist in the National Tariff Commission Act, 1990. In the light of above discussion, it is clear that the existence of the provision of quorum and saving clause in case of any vacancy or defect in constitution of the Authority in NEPRA Act clearly distinguishes the case and legal position of NEPRA from the referred Judgment. The Authority, therefore, do not agree with the reasoning and objection taken by the learned counsel for the Petitioner and hold that it is duly constituted in the light of the referred provisions of NEPRA Act and all decisions taken by it shall be valid and in line with the spirit and mandate of NEPRA Act.

8. The learned counsel for the Petitioner also stated that in terms of the provisions of Rule 16(6) of the Tariff Rules, instant motion for leave for review can only be heard by the full strength of the Authority and full strength means four members and one chairman. The Authority has analyzed this objection in the light of the provisions of the NEPRA Act, Tariff Rules and Review Regulations and believes that the objection and reasoning of the learned counsel for the Petitioner is not based upon correct interpretation and appreciation of scheme of law. The power of review has been provided in section 7(2)(g) of NEPRA Act and it provides that the Authority shall review its orders, decisions or determinations and there is no condition that the review shall be heard and decided by the full strength of the Authority. Though the word, "Full Authority" has been used in the Rule 16(6) of the Tariff Rules however as per established rules of interpretation, the provisions of any rules cannot be read in isolation to the provisions of act under which they have been framed and in case of inconsistency, the provisions of act shall prevail and when this provision of the Tariff Rules is read with the provisions of the NEPRA Act, it can and will only mean that the review will be heard and decided by the full strength of the Authority posted and functioning at any point of time subject to the provisions of section 3(6) and 5(2) of NEPRA Act. However, the Authority believes that the procedure provided in Tariff Rules is not, *stricto sensu*, applicable in the instant case as Tariff Rules only apply when the Authority gives any tariff determination/decision on a tariff petition filed by any party and the review is filed against the tariff determination/decision of the Authority. In the instant case, no tariff petition was filed by the Petitioner and the Authority, on its own, as per information provided by the Petitioner, adjusted the calorific value figure as per adjustment mechanism already prescribed by the Authority therefore the procedure in the Review Regulations shall be applicable and in Review Regulations, there is no requirement that it shall be heard and decided by the full strength of the Authority.
9. The Petitioner also stated that the Impugned Order has been passed by giving retrospective effect to Decision dated 22nd July 2011 of the Authority contrary to established legal principles? The learned counsel for the Petitioner stated that the reference value of 18,364 BTUs/lb was





adopted in March 04, 2009 decision and the same has been maintained since. Further, the reference values for each of the five refineries were also calculated in the March 04, 2009 decision and the same were not reviewed at any stage thereafter. The learned counsel for the Petitioner further stated that the adjustment mechanism provided in the first two decisions i.e. decision dated March 4, 2009 and decision dated January 06, 2010 was only in respect of the said reference values and there was no reference whatsoever to actual consignment wise values of CV. The reference to consignment wise record of CV and obligation to maintain such record was introduced for the first time on 22nd July 2011 and in the Impugned Order, retrospective effect has been given to the decision dated 22nd July 2011.

10. The Authority has considered the contentions of the Petitioner in the light of the decisions of the Authority referred by the Petitioner and is unable to understand that how the Petitioner is aggrieved by the Impugned Order and can call it retrospective. The Authority in its Order dated April 13, 2007 prescribed a fuel price mechanism and directed the fuel supplier to provide price adjustment mechanism due to variation in calorific value of the fuel being supplied to the IPP against the reference calorific value. In the referred Order, the reference calorific value of 18,500 Btus/lb. was used. The IPPs were of the view that the reference CV was not realistic as in the market fuel oil of such heating value was not always available. In order to address the concerns of the IPPs, the Authority initiated a consultative process with the key stakeholders and decided on March 04, 2009 to adopt reference CV of 18,364 Btus/lb. and to review the CV annually during the month of January each year on the basis of actual CV established during the preceding calendar year. It is pointed out that the adjustment on account of variation in CV against the reference value practically not possible without having complete record of consignment wise oil procurement. Even if the adjustment due to CV variation was not required, the IPPs carry out consignment wise tests of oil received to ensure the quality of oil in accordance with the prescribed specifications and accordingly maintain such record being prudent utility practice. The Authority, decision with respect to provision of consignment wise CV was just to further elaborate and clarify the mechanism. It is further pointed out that fuel is a pass-through, therefore any variation either on account of price or CV has to be adjusted without any gain or loss to the power producer. The principle of fairness, equity and justice demands that any claim of adjustment has to be only supported with the verifiable documentary evidence. In view of the aforesaid reason, the Authority considers that the Petitioner's contention with respect to maintenance of consignment record is not valid.
11. NEPRA on 14th October 2009 conducted another meeting of the key stakeholders including oil marketing companies, IPPs, power purchaser, Ministry of Water and Power and others to discuss fuel pricing mechanism and calorific value. On the basis of the recommendations of the participants, the Authority on 5th January 2010 decided to allow quarterly adjustment in fuel cost component of IPPs generation tariff due to variation in CV of RFO against the approved source wise reference CV as per the Authority's decision dated March 04, 2009 from which the IPP would be getting its fuel supply and annual review of reference CV for each source in accordance with the Authority's decision dated March 4, 2009.





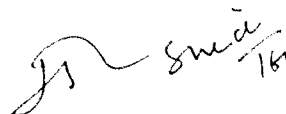
12. Nishat Chunian Power Limited, an IPP, vide its letter dated 30th September 2010 requested as "we have purchased some fuel from the PARCO in the past and may further purchase from the same source in case of need. We got the sample from PARCO and got them checked from Hydrocarbon Development Institute of Pakistan and found that the actual CV of the fuel is much less than the standard already set by the Authority. We are enclosing herewith copies of Test Reports of sample taken from PARCO which are showing Gross Calorific Value ranging from 18340 to 18345 Btu/lb. It is therefore requested that while reviewing the calorific value which is due effective January 1, 2010 the same factor may also be taken into account". Another IPP Atlas Power Limited vide its letter dated October 19, 2010 stated that the comparison of test reports of PARCO and HDIP for the same fuel indicated that the PARCO test reports are overstated by around 250 Btu/lb.
13. In order to arrive at a judicious decision the relevant information with respect to CV of different refineries was sought. In response thereof, Hydro Carbon Institute of Pakistan (HDIP) and vide its letter dated 19th January 2011 showed its inability to provide CV data of furnace oil HDIP and informed that CV data of locally produced HSFO supplied by the local refineries could be obtained from refineries through DG (Oil), MOP&NR".
14. The Petitioner's contention for not maintaining the required record was also not found correct as two of the IPPs Atlas and Hubco provided the detailed consignment wise record for CV adjustment in accordance with the decision of the Authority date July 22, 2011. The Petitioner was given ample opportunity to submit the required information through various communications. Since the Petitioner did not provide the required information; therefore the Authority decided to obtain the name directory from the refineries for local furnace oil and HDIP for imported furnace oil. Accordingly based thereon the adjustment on account of calorific value was made.
15. The Authority considers that the Petitioner's legitimate profit is to the extent of the return on equity allowed and there is no justification of making profit on account of fuel being pass through. The Authority is of view that the Petitioner has misinterpreted the obligation imposed by the Authority for the provision of information in support of its claim as being licensee, the Petitioner is bound to follow the provisions of NEPRA Act Rules and Regulations made there under. In terms of the provisions of NEPRA Licensing (Generation) Rules, 2000 and NEPRA (Uniform System of Accounts) Rules, 2009, the Petitioner is bound to ensure that all purchases or procurements including, without limitation, fuel, lubricants, spares etc are made prudently and is also bound to maintain the record and accounts of each and every procurement and cost, therefore, even without any direction of the Authority, the Petitioner is bound to maintain the consignment wise details record of procurement of fuel for claiming adjustment against actual CV figures established after analyzing and examining the relevant consignment wise records. As it is clear from the paragraphs that the CV adjustment was provided in the Authority's determination even before the start of the project; therefore, the Petitioner's contention that it was applied retrospectively is incorrect.



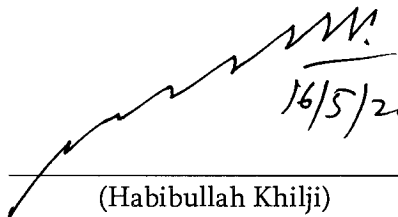


16. In the light of the above discussion, the Authority is of the view that the Petitioner has failed to bring any new and important matter of evidence which was not considered by the Authority at the time of decision dated 8th February 2013 and has also failed to point out any mistake or error apparent on the face of record. The fact of the matter also evident from the perusal of the above referred decision is that all material facts and circumstances were in the knowledge of the Authority and the record clearly shows that the Authority issued the decision after consideration of all material facts and documents. Therefore, the Authority is of the view that the motion for leave for review can not be considered in terms of Regulation 3(2) of NEPRA (Review Procedure) Regulations 2009 read with Rule 16(9) of the Tariff Rules and the same is hereby declined.

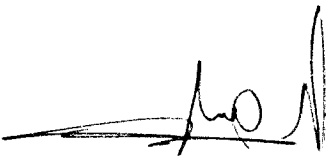
AUTHORITY



(Maj (R) Haroon Rashid)
Member



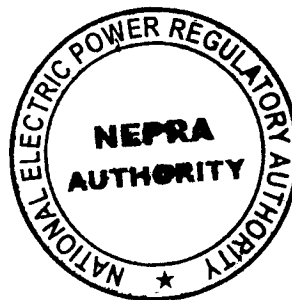
(Habibullah Khilji)
Member

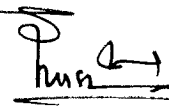


(Khawaja Muhammad Naeem) *JS S xlll*
Member

Retired on 26-4-2013

(Shaukat Ali Kundi)
Vice Chairman





17-5-13